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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Edward Gallagher, a single person,
9
10 Plaintiff,

No. CV17-1879-PHX-DGC

ORDER

11 v.

12 Wells Fargo Bank, N.A., a foreign
13 corporation; ABC Corporations, XZY
Partnerships, and John and Jane Does I-X,

14 Defendants.
15

16 Plaintiff Edward Gallagher moves to remand this case to state court. Doc. 19.
17 Defendant Wells Fargo Bank opposes remand and moves to dismiss Plaintiff's second
18 amended complaint pursuant to Rule 12(b)(6). Doc. 23. The motions are fully briefed
19 and no party has requested oral argument. For reasons stated below, the Court will deny
20 the motion to remand and grant the motion to dismiss in part.

21 **I. Background.**

22 Gallagher filed suit in Arizona state court against his mortgage lender, Wells
23 Fargo, alleging that it wrongfully handled two property insurance claims and instituted
24 foreclosure proceedings. Doc. 1-1 ¶¶ 15-40. The original complaint alleges six causes of
25 action: conversion, breach of contract, breach of fiduciary duty, breach of the implied
26 covenant of good faith and fair dealing, negligent misrepresentation, and intentional
27 misrepresentation. Doc. 1-1. The complaint also seeks an injunction preventing Wells
28 Fargo from holding the scheduled trustee sale. *Id.* Since removal, the parties have

1 stipulated to withdrawal of the injunctive relief claims and Gallagher has filed first and
2 second amended complaints. *See* Docs. 11, 13, 18.

3 **II. Motion to Remand.**

4 Any civil action over which the federal district courts have original jurisdiction
5 may be removed from state court to the federal court for the district where the action is
6 pending. 28 U.S.C. § 1441(a). Courts strictly construe the statute against removal
7 jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Indeed, there is a
8 “strong presumption” against removal, and “[f]ederal jurisdiction must be rejected if there
9 is any doubt as to the right of removal in the first instance.” *Id.* This strong presumption
10 “means that the defendant always has the burden of establishing that removal is proper.”
11 *Id.* “If at any time before final judgment it appears that the district court lacks subject
12 matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c).

13 The Court has jurisdiction over cases in which the parties are diverse and the
14 amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. Gallagher argues that the
15 amount in controversy requirement is not satisfied in this case. Doc. 19 at 2.¹

16 The original complaint does not allege an amount in controversy. Rather, it
17 requests “compensatory damages in an amount to be proven at trial,” punitive damages
18 “sufficient to deter Wells Fargo from engaging in such conduct in the future,” an
19 injunction preventing the trustee sale, attorney’s fees, and “other relief that the Court
20 deems just and proper.” Doc. 1-1 at 12-13. Gallagher certified in the state court action
21 that he was seeking more than \$50,000, the compulsory arbitration threshold. Doc. 1-3
22 at 2.

23
24 ¹ Throughout its response, Wells Fargo refers to information in Gallagher’s first
25 and second amended complaints filed after removal, but “post-removal amendments to the
26 pleadings cannot affect whether a case is removable, because the propriety of removal is
27 determined solely on the basis of the pleadings filed in state court.” *Williams v. Costco*
28 *Wholesale Corp.*, 471 F.3d 975, 976 (9th Cir. 2006). Wells Fargo cites no authority to
support its position that the Court should consider the amendments because they “merely
clarify” the original complaint (Doc. 24 at 6), and Gallagher disputes this characterization
(Doc. 25 at 6). The Court will consider only the original complaint in determining
whether the case was properly removed.

1 Wells Fargo “bears the burden of establishing, by a preponderance of the evidence,
2 that the amount in controversy exceeds [\$75,000].” *Sanchez v. Monumental Life Ins. Co.*,
3 102 F.3d 398, 404 (9th Cir. 1996). Wells Fargo’s notice of removal asserts that “Plaintiff
4 seeks an order permanently enjoining the trustee’s sale of real property believed to be
5 valued in excess of \$250,000 and which secures a loan with a remaining unpaid balance in
6 excess of \$132,000,” and that “Plaintiff further seeks unspecified compensatory damages,
7 punitive damages, and attorney’s fees.” Doc. 1 ¶ 8.

8 Wells Fargo contends that because the original complaint seeks a permanent
9 injunction preventing sale of the property, the loan balance or property value – which both
10 exceed \$75,000 – are appropriate measures of damages. Doc. 24 at 9-11. Gallagher does
11 not dispute that the property value and loan amount exceed \$75,000, but argues that these
12 are not relevant measures of damages because the complaint seeks only a temporary
13 injunction to allow litigation of his compensatory claims and does not seek rescission of
14 the loan. Doc. 19 at 4-7.

15 “In actions seeking declaratory or injunctive relief, it is well established that the
16 amount in controversy is measured by the value of the object of the litigation.” *Cohn v.*
17 *Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (citing *Hunt v. Wash. State Apple Adver.*
18 *Comm’n*, 432 U.S. 333, 347 (1977)). Gallagher concedes that generally the object of a
19 lawsuit brought to enjoin a bank from selling property is that property. Doc. 19 at 3
20 (citing *Lee v. Wells Fargo Bank, N.A.*, 2015 WL 5618869, at *5 (C.D. Cal. Sep. 24,
21 2015); *Garfinkle v. Wells Fargo Bank*, 483 F.2d 1074, 1076 (9th Cir. 1973)). But he
22 argues that this case is an exception because it was not brought for the primary purpose of
23 enjoining foreclosure. Doc. 19 at 4-7. Rather, Gallagher claims, the focus of the case is
24 monetary damages for wrongful conduct. *Id.* The Court disagrees.

25 Gallagher brought this case just four days before the scheduled trustee sale of his
26 property. The complaint asserts within the first two pages that Gallagher’s “property is
27 the subject matter of this claim.” Doc. 1-1 ¶ 8. It alleges that as “a direct and proximate
28 result of Wells Fargo’s” conduct, Gallagher “has suffered or will suffer from the loss of

1 [\$20,842] and his home.” *Id.* ¶ 57. It alleges that Wells Fargo intentionally withheld
2 insurance proceeds so that Gallagher would be unable to repay the loan and Wells Fargo
3 could sell the property. *Id.* ¶ 64. And it requests “temporary, preliminary and permanent
4 injunctive relief.” *Id.* ¶¶ 47, 50. Gallagher brought suit primarily to prevent foreclosure,
5 which fairly puts at least the remaining loan balance, if not the value of the property, in
6 issue. Wells Fargo has met its burden of showing that the amount in controversy exceeds
7 \$75,000.

8 **III. Motion to Dismiss.**

9 Defendant moves to dismiss the second amended complaint (“SAC”) pursuant to
10 Rule 12(b)(6). Doc. 23. For purposes of ruling on the motion, the SAC’s factual
11 allegations must be accepted as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

12 Gallagher’s real property is located in Glendale, Arizona, and is subject to a deed
13 of trust securing repayment of a loan from Wells Fargo. Doc. 18 ¶ 5. Gallagher and his
14 wife originally purchased the property in 1978, but Gallagher refinanced the property in
15 2008. *Id.* ¶¶ 9-11. Gallagher has AAA hazard insurance coverage on the property. *Id.*
16 ¶ 12. With respect to this coverage, the deed of trust between Gallagher and Wells Fargo
17 states:

18 All or part of the Insurance proceeds may be applied by Lender, at its
19 option, either, (a) to the reduction of the indebtedness under the Note and
20 this Security Instrument, first to any delinquent amounts applied in the order
21 in paragraph 3, and then to prepayment of principal, or (b) to the restoration
or repair of the damaged Property.

22 *Id.* ¶ 45. The SAC alleges that Gallagher was harmed by Wells Fargo’s conduct regarding
23 three separate transactions: a 2010 property insurance claim, a 2015 property insurance
24 claim, and a failed loan modification. The Court will summarize the relevant facts of each
25 transaction.

26 In 2010, Gallagher’s property was damaged by a hail storm and AAA approved a
27 claim for \$69,229.54. *Id.* ¶¶ 14-15. Gallagher hired a contractor to perform the repairs.
28 *Id.* ¶ 16. The contractor moved out of state, leaving \$16,000 to \$19,000 of work

1 unfinished. *Id.* ¶¶ 19-20. Gallagher requested that Wells Fargo disburse \$51,127.22 for
2 the work that was completed. *Id.* ¶ 18. Wells Fargo paid this amount to the contractor,
3 and then paid the contractor an additional \$16,288.97 in June 2013 without completing an
4 inspection of the property or obtaining Gallagher’s approval. *Id.* ¶¶ 21-28. Gallagher was
5 out of town and ill for “many months” during this time and therefore was not available to
6 verify the repairs. *Id.* ¶ 23. Months after the checks were sent to the contractor, Gallagher
7 contacted Wells Fargo to inquire about the claim. *Id.* ¶ 26. Wells Fargo indicated that the
8 “final check” was applied to Gallagher’s account, referring to the remaining \$1,950. *Id.*
9 ¶¶ 27-28. Wells Fargo did not mention the \$16,288.97 check sent to the contractor – of
10 which Gallagher was unaware. *Id.* ¶ 29.

11 In February 2016, Gallagher was conditionally approved for a loan modification
12 that would have reduced his monthly payments by \$291.11. *Id.* ¶¶ 30-31. Believing,
13 however, that Wells Fargo owed him thousands of dollars from the 2010 claim, Gallagher
14 refused to sign the modification agreement unless Wells Fargo turned over certain
15 documents relating to the 2010 claim. *Id.* ¶¶ 32, 35. Wells Fargo turned over some but
16 not all of the documents, and Gallagher refused to sign the modification agreement. *Id.*
17 ¶¶ 34, 36.

18 In April 2016, Gallagher filed another claim with AAA related to a hail storm that
19 occurred in October 2015. *Id.* ¶ 27; Doc. 1-1 ¶ 37. AAA approved a claim for \$28,412.83
20 (with an actual cash value of \$20,968.64). Doc. 18 ¶ 38. In August 2016, AAA issued a
21 \$19,653.33 check to Gallagher, but he did not send the check to Wells Fargo until
22 February 27, 2017. *Id.* ¶ 39, 41. Meanwhile, on February 9, 2017, Wells Fargo denied
23 the loan modification because Gallagher refused to sign it, and on February 15, 2017,
24 Wells Fargo began foreclosure proceedings. *Id.* ¶¶ 34, 36, 40. The first AAA check (sent
25 by Gallagher on February 27) had expired by the time it reached Wells Fargo, and AAA
26 issued a new check for \$20,342 on March 16, 2017. *Id.* ¶¶ 42, 44. On March 3, 2017 –
27 between issuance of the two checks – Gallagher contracted with Atlas Construction Group
28 to perform the repairs. *Id.* ¶ 43.

1 On April 10, 2017, Gallagher contacted Wells Fargo to ask why it had not released
2 the repair funds. *Id.* ¶ 46. Wells Fargo responded that the funds would be applied to the
3 cost of foreclosing on his property. *Id.* ¶ 47. Gallagher stated that he wished to make the
4 repairs, but Wells Fargo responded that he would need to “improve loan status” before it
5 would release the funds. *Id.* ¶¶ 48-49. Wells Fargo requested documents from Atlas,
6 which Atlas provided. *Id.* ¶ 50. On April 27, 2017, Wells Fargo informed Atlas that it
7 would overnight a check to Gallagher to fund the repairs, but Wells Fargo’s internal notes
8 indicated that it would not send the check. *Id.* ¶¶ 51-52. Wells Fargo never released the
9 repair funds. As a result, the repairs cannot be completed and Gallagher cannot receive an
10 \$8,070.83 depreciation payment from AAA. *Id.* ¶¶ 54-56. Gallagher was unable to pay
11 Atlas, and Atlas is seeking a judgment against Gallagher for its overhead and profit in the
12 amount of \$4,420.80. *Id.* ¶ 57.

13 As of April 17, 2017, Gallagher was over one year behind on his loan payments
14 and his redemption amount was \$20,693.89. *Id.* ¶ 58; Doc. 18-2 at 9-10. The property
15 was scheduled to be sold at auction on May 23, 2017, but Wells Fargo cancelled the sale
16 and elected to apply the 2015 insurance proceeds to Gallagher’s account on July 20, 2017.
17 Doc. 18 ¶¶ 53, 60-61. As a result of Wells Fargo’s conduct with respect to the 2010
18 claim, the failed loan modification, and the 2015 claim, Gallagher has become “severely
19 weak” and “bed-ridden.” *Id.* ¶ 59. The SAC asserts four causes of action based on these
20 facts: negligence, breach of contract, breach of fiduciary duty, and breach of the implied
21 covenant of good faith and fair dealing. Doc. 18.

22 **A. Legal Standard.**

23 A successful motion to dismiss under Rule 12(b)(6) must show either that the
24 complaint lacks a cognizable legal theory or fails to allege facts sufficient to support its
25 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A
26 complaint that sets forth a cognizable legal theory will survive a motion to dismiss as long
27 as it contains “sufficient factual matter, accepted as true, to ‘state a claim to relief that is
28 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp.*

1 v. *Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when “the plaintiff
2 pleads factual content that allows the court to draw the reasonable inference that the
3 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*,
4 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but
5 it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

6 **B. Discussion.**

7 **1. Negligence.**

8 An Arizona negligence claim requires that a plaintiff show: (1) defendant had a
9 duty, (2) defendant breached that duty, (3) a causal connection between defendant’s
10 breach and the resulting injury, and (4) actual damages. *Gipson v. Kasey*, 150 P.3d 228,
11 230 (Ariz. 2007). The SAC alleges that “Wells Fargo had a duty to apply the insurance
12 funds according to their deed of trust”; “Wells Fargo was required to either apply
13 proceeds to Gallagher’s account or to the repairs”; and “Wells Fargo breached their duty
14 by not making an election.” Doc. 18 ¶¶ 63-66. Wells Fargo argues that Gallagher’s
15 negligence claim is barred by the economic loss rule and fails to allege breach and
16 causally connected damages. Doc. 23 at 5.

17 Plaintiff’s response does not address any of Wells Fargo’s arguments regarding the
18 negligence claim. *See* Doc. 26. When a party fails to file a response, the Court may deem
19 the party to have consented to granting the motion. *See* LRCiv. 7.2(i). The Court is “not
20 obligated to search for legal theories not clearly laid out in Plaintiff’s response to the
21 motion or in his amended complaint.” *Mansour v. Cal-W. Reconveyance Corp.*, No. CV-
22 09-37-PHX-DGC, 2009 WL 2132695, at *3 (D. Ariz. July 15, 2009). Gallagher’s failure
23 to respond to Wells Fargo’s negligence arguments provides sufficient reason for the Court
24 to grant the motion with respect to his negligence claim.

25 The Court also finds Wells Fargo’s arguments well-taken. Gallagher has failed to
26 plead any damages caused by its allegedly negligent conduct. Doc. 23 at 7-8. The SAC
27 identifies the following damages: approximately \$5,000 that Gallagher owes Atlas, lost
28 depreciation from the 2015 insurance claim, “serious emotional distress,” and “adverse

1 effects” to Gallagher’s property. Doc. 18 ¶¶ 67-70. But any judgment that Atlas seeks
2 from Gallagher is not a result of Wells Fargo’s conduct – Gallagher entered into the
3 contract with Atlas voluntarily and before he knew whether Wells Fargo would elect to
4 use the insurance proceeds for the repairs. Additionally, Gallagher was not entitled to the
5 alleged lost depreciation; depreciation was to be paid if the repairs were performed, but
6 Wells Fargo could elect not to perform the repairs. *See* Doc. 23 at 8. And negligent
7 infliction of emotional distress is not actionable in Arizona without an allegation of
8 accompanying physical injury, which Gallagher does not make. *See Gau v. Smitty’s*
9 *Super Valu, Inc.*, 901 P.2d 455, 457 (Ariz. Ct. App. 1995). Finally, the Court will not
10 speculate as to the meaning of unspecified “adverse effects.” The Court will grant the
11 motion with respect to Gallagher’s negligence claim.

12 **2. Breach of Contract.**

13 To plead a breach of contract claim, a plaintiff must identify a contract, breach, and
14 damages. *Thunderbird Metallurgical, Inc. v. Ariz. Testing Labs.*, 423 P.2d 124, 126 (Ariz.
15 Ct. App. 1967). The SAC alleges two separate breaches. First, it alleges that Wells Fargo
16 breached the deed of trust by failing to make an election regarding the 2015 insurance
17 proceeds “in a reasonable time as required.” Doc. 18 ¶ 79. Second, it alleges that Wells
18 Fargo breached “agreements to provide a loan modification” by refusing to provide the
19 documents Gallagher requested. *Id.* ¶¶ 75-78. As a result of these injuries, Gallagher
20 alleges he suffered “irreparable injury.” *Id.* ¶ 83.

21 Wells Fargo contends that the SAC fails to state a claim because the deed of trust
22 does not require it to make an election within any specified timeframe, nor does it require
23 Wells Fargo to provide a loan modification or requested documents. Doc. 23 at 8-11.
24 Wells Fargo also argues that Gallagher cannot maintain a claim for breach because he was
25 in default prior to Wells Fargo’s alleged breaches. *Id.* Again, Gallagher does not respond
26 to any of these arguments. *See* Doc. 26 at 5-6.

27 The Court agrees that the SAC fails to plead facts sufficient to support a breach of
28 contract claim. The only contract Gallagher identifies is the deed of trust, which contains

1 no time requirement for elections and no requirement that Wells Fargo provide a loan
2 modification or documents upon request.

3 Gallagher's response suggests a third breach based on Wells Fargo's conduct
4 surrounding the 2010 insurance claim. Doc. 26 at 6. This claim is not pled in the SAC,
5 and even if it were, Gallagher has not identified a contractual provision that was breached
6 or how Wells Fargo breached it by its 2010 conduct. The motion to dismiss will be
7 granted with respect to Gallagher's breach of contract claims.

8 **3. Breach of Fiduciary Duty.**

9 Wells Fargo argues that the SAC fails to state a claim for breach of fiduciary duty
10 because there was no fiduciary relationship. Doc. 23 at 11-23. Gallagher responds that
11 Wells Fargo assumed a fiduciary duty by agreeing to "serve as a custodian/trustee" of
12 insurance proceeds under Gallagher's policy with AAA. Doc. 26 at 7. To support his
13 argument, Gallagher relies on the insurance covenant in the deed of trust and a loan
14 statement from April 2017, which indicates that the 2015 insurance claim proceeds were
15 being held in a "restricted escrow" account. *Id.*; Doc. 18-2 at 9.²

16 "A fiduciary relationship is a confidential relationship whose attributes include
17 great intimacy, disclosure of secrets, [or] intrusting of power." *Standard Chartered PLC*
18 *v. Price Waterhouse*, 945 P.2d 317, 335 (Ariz. Ct. App. 1996), *as corrected on denial of*
19 *reconsideration* (Jan. 13, 1997) (quotation marks and citations omitted). "It is well settled
20 in Arizona that the relationship between a Bank and an ordinary depositor, absent any
21 special agreement, is that of debtor and creditor." *McAlister v. Citibank (Ariz.)*, a
22 *Subsidiary of Citicorp*, 829 P.2d 1253, 1258 (Ariz. Ct. App. 1992) (quotation marks and
23 citations omitted); *see also Glava v. JPMorgan Chase Bank, N.A.*, No. 1 CA-CV 13-0719,

24
25 ² The Court considers the deed of trust because the SAC refers to it repeatedly, it is
26 central to Gallagher's claims, and Gallagher has not questioned the authenticity of the
27 copy submitted with Wells Fargo's motion. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th
28 Cir. 2006) ("A court may consider evidence on which the complaint 'necessarily relies' if:
(1) the complaint refers to the document; (2) the document is central to the plaintiff's
claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6)
motion."). Moreover, Gallagher does not object to the Court's consideration of the
document, and in fact refers to it throughout his response. *See* Doc. 26 at 1-2, 7-8, 11.

1 2015 WL 849685, at *5 (Ariz. Ct. App. Feb. 26, 2015) (“In Arizona, absent a special
2 agreement, a debtor/creditor relationship does not create a fiduciary relationship.”).

3 Gallagher cites no case to support his theory that a bank becomes a fiduciary
4 simply by holding certain funds in an escrow account.³ Moreover, the deed of trust makes
5 clear that Wells Fargo was not, as Gallagher asserts, holding the proceeds for Gallagher’s
6 “sole benefit.” See Doc. 26 at 8. The deed of trust required Gallagher to obtain hazard
7 insurance that would be “held by” and “include loss payable clauses in favor of” Wells
8 Fargo. Doc. 23-1 at 4. Gallagher agreed that any insurance proceeds would be paid
9 directly to Wells Fargo, and that Wells Fargo could, in its discretion, apply the proceeds to
10 his indebtedness or to repair the property. *Id.* Finally, Gallagher agreed that in the event
11 of foreclosure or transfer of the property, the rights to the insurance policies would pass to
12 the purchaser. *Id.* These provisions make clear that Wells Fargo’s purpose in holding the
13 insurance proceeds was to protect its own interest. Wells Fargo did not hold itself out as a
14 “neutral conduit of funds.” *Gustafson v. BAC Home Loans Servicing, LP*, No. SACV 11-
15 915-JST ANX, 2012 WL 7051318, at *8 (C.D. Cal. Dec. 20, 2012). Gallagher has not
16 pled facts suggesting there was a special, confidential relationship other than the ordinary
17 borrower-lender relationship. Thus, Gallagher has not alleged facts showing that Wells
18 Fargo had a fiduciary duty.

19 **4. Implied Covenant of Good Faith and Fair Dealing.**

20 “Arizona law implies a covenant of good faith and fair dealing in every contract.”
21 *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension*
22 *Tr. Fund*, 38 P.3d 12, 28 (Ariz. 2002). The implied covenant “prohibits a party from
23 doing anything to prevent other parties to the contract from receiving the benefits and
24 entitlements of the agreement.” *Id.* The implied terms of the covenant are as much a part
25 of the contract as the express terms, but they cannot directly contradict those express
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27 ³ The only Arizona case cited by Gallagher in this portion of his argument concerns
28 disputes between an estate’s beneficiaries and the trustees and representatives of the
estate, not banking relationships. Doc. 26 at 8 (citing *Tovrea v. Nolan*, 875 P.2d 144, 146
(Ariz. Ct. App. 1993)).

1 terms. *Kuehn v. Stanley*, 91 P.3d 346, 354 (Ariz. 2004); *Bike Fashion Corp. v. Kramer*,
2 46 P.3d 431, 434 (Ariz. 2002). “Thus, Arizona law recognizes that a party can breach the
3 implied covenant of good faith and fair dealing both by exercising express discretion in a
4 way inconsistent with a party’s reasonable expectations and by acting in ways not
5 expressly excluded by the contract’s terms but which nevertheless bear adversely on the
6 party’s reasonably expected benefits of the bargain.” *Bike Fashion Corp.*, 46 P.3d at 435;
7 *accord Ariz. Laborers*, 38 P.3d at 30 (“[i]nstances inevitably arise where one party
8 exercises discretion retained or unforeclosed under a contract in such a way as to deny the
9 other a reasonably expected benefit of the bargain.”) (citation omitted). To determine the
10 parties’ reasonable expectations, “the relevant inquiry always will focus on the contract
11 itself, to determine what the parties did agree to.” *Rawlings v. Apodaca*, 726 P.2d 565,
12 570 (Ariz. 1986) (quotation marks and citation omitted); *Bike Fashion Corp.*, 46 P.3d at
13 435 (“the express terms are presumed to be the best indicator of the parties’ reasonable
14 expectations”).

15 The SAC alleges that Wells Fargo owed a duty of good faith and fair dealing
16 pursuant to the deed of trust, and breached that duty with respect to (1) the 2010 insurance
17 claim by failing to obtain an inspection or Gallagher’s approval for the repairs and
18 misleading Gallagher about the final check, (2) the 2015 insurance claim by unreasonably
19 delaying its election, and (3) the loan modification by not disclosing the information
20 Gallagher requested. Doc. 18 ¶¶ 104-09, 113-17.

21 **a. Tortious Breach of the Implied Covenant.**

22 A plaintiff may sue for breach of the implied covenant in contract or tort.
23 *Rawlings*, 726 P.2d at 574. To bring a tortious implied covenant claim, the parties must
24 have a “special relationship . . . arising from elements of public interest, adhesion, and
25 fiduciary responsibility.” *Ariz. Laborers*, 38 P.3d at 29 (quoting *Burkons v. Ticor Title*
26 *Ins. Co. of Cal.*, 813 P.2d 710, 721 (Ariz. 1991)). As explained above, Gallagher has not
27 alleged facts or cited precedent to establish a fiduciary relationship in this case. Nor has
28 Gallagher alleged a contract of adhesion or unequal bargaining power that would give rise

1 to a special relationship. *See Wilson v. PNC Mortg.*, No. 1 CA-CV 14-0024, 2015 WL
2 448601, at *9 (Ariz. Ct. App. Feb. 3, 2015), *review denied* (Sept. 22, 2015) (citing
3 *McAlister*, 829 P.2d at 1259, and finding no special relationship between mortgagor and
4 mortgagee because “a mere difference in bargaining power without more does not
5 establish a special relationship between parties”). To the extent Gallagher alleges tortious
6 breach of the implied covenant, the claim will be dismissed.

7 **b. 2010 Insurance Claim.**

8 Wells Fargo argues that Gallagher cannot state a claim based on the 2010 insurance
9 proceeds because the statute of limitations has run. Doc. 23 at 4. With respect to the
10 2010 claim, Gallagher alleges that Wells Fargo sent the final disputed check to the
11 contractor on June 28, 2013, and misled Gallagher when he called to inquire about the
12 claim “months later.” Doc. 18 ¶¶ 24, 26. Wells Fargo asserts that the statute of
13 limitations for breach of the implied covenant of good faith and fair dealing is two years.
14 Doc. 23 at 4 (citing *Serrano v. Serrano*, No. 1 CA-CV 10-0649, 2012 WL 75639, at *6
15 (Ariz. Ct. App. Jan. 10, 2012)). Gallagher argues that the discovery rule applies, tolling
16 the statute of limitations until he discovered the final check in August 2017. Doc. 26 at 6;
17 *see Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 898 P.2d 964, 966 (Ariz.
18 1995) (“Under the ‘discovery rule,’ a plaintiff’s cause of action does not accrue until the
19 plaintiff knows or, in the exercise of reasonable diligence, should know the facts
20 underlying the cause.”).

21 Wells Fargo replies that “it is simply not plausible that Plaintiff was not aware of
22 the fact that Wells Fargo did not reduce his loan balance by the disputed amount.”
23 Doc. 29 at 3. But a motion to dismiss on statute of limitations grounds may be granted
24 only when the running of the statute is apparent on the face of the complaint, and “the
25 assertions of the complaint, read with the required liberality, would not permit the plaintiff
26 to prove that the statute was tolled.” *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th
27 Cir. 1980); *see also TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999); *Hernandez v.*
28 *City of El Monte*, 138 F.3d 393, 402 (9th Cir. 1998) (“Because the applicability of the

1 equitable tolling doctrine often depends on matters outside the pleadings, it is not
2 generally amenable to resolution on a Rule 12(b)(6) motion.”) (citations and quotation
3 marks omitted). The SAC’s allegations do not preclude Gallagher from proving that the
4 statute of limitations should be tolled due to Wells Fargo’s actions of concealment.

5 Gallagher also argues that his claim is within the “seven year statute of limitations
6 for breach.” Doc. 26 at 6. Gallagher does not identify any authority for this seven-year
7 limitation, but the Court notes that the six-year statute of limitations applicable to contract
8 actions under A.R.S. § 12-548 may apply to Gallagher’s claim rather than the two-year
9 tort limitation suggested by Wells Fargo. *See Ariz. Laborers*, 38 P.3d at 29 (explaining
10 that implied covenant claims in Arizona are contractual unless a special relationship
11 exists); *see also Gust, Rosenfeld & Henderson*, 898 P.2d at 968 (“The defense of statute of
12 limitations is never favored by the courts, and if there is doubt as to which of two
13 limitations periods should apply, courts generally apply the longer.”).

14 In either case, Gallagher has stated a claim for breach of the implied covenant of
15 good faith and fair dealing based on Wells Fargo’s handling of the 2010 insurance claim.⁴

16 **c. 2015 Insurance Claim.**

17 Wells Fargo contends that its delay in making an election for the 2015 insurance
18 proceeds cannot support a claim because its actions were specifically authorized by the
19 deed of trust. Doc. 23 at 13-14. The deed of trust grants Wells Fargo discretion to apply
20 insurance proceeds either to Gallagher’s indebtedness or the cost of repairs, but does not
21 identify a time within which Wells Fargo must make an election. Gallagher alleges that,
22 by delaying its decision for three months, Wells Fargo “exercised express discretion in a
23 way inconsistent with his reasonable expectations.” *Bike Fashion Corp.*, 46 P.3d at 435.
24 The SAC alleges that Wells Fargo intentionally held the proceeds “that would have
25 redeemed Mr. Gallagher” to ensure that he would not be able to afford the large
26 redemption amount. Doc. 18 ¶ 115. Gallagher’s response also asserts that Wells Fargo’s

27 ⁴ Wells Fargo’s only argument for dismissal of the claim based on the 2010
28 insurance proceeds is that it is time-barred. *See* Doc. 23 at 4-5; Doc. 29 at 2-3. Wells
Fargo does not assert any substantive deficiency.

1 delay and handling of the 2015 claim denied him the expected “protection, security and
2 peace of mind that come from having the mortgagee manage the funds and prevent the
3 economic consequences of catastrophe.” Doc. 26 at 10. Although Wells Fargo ultimately
4 applied the proceeds to his loan balance, the delay allegedly caused Gallagher to incur
5 additional interest and fees. Doc. 18 at 12-13. These allegations are sufficient to state a
6 claim for breach of the implied covenant based on Wells Fargo’s handling of the 2015
7 insurance proceeds.

8 **d. Loan Modification.**

9 The SAC alleges that because Wells Fargo refused to disclose the documents he
10 requested, Gallagher was denied a loan modification and defaulted on his loan. Doc. 18
11 ¶¶ 108-11. Wells Fargo argues that these allegations cannot support a claim because loan
12 modification was not a reasonably expected benefit of the deed of trust. Doc. 23 at 13.
13 The Court agrees that the deed of trust contains no indication that loan modification was
14 an expected benefit. Thus, Gallagher cannot allege a claim for breach of the implied
15 covenant based on Wells Fargo’s denial of the modification. *See Weisman v. Capital One*
16 *NA*, No. CV-15-00657-PHX-GMS, 2016 WL 558416, at *3 (D. Ariz. Feb. 12, 2016)
17 (“[A]bsent factual allegations that the underlying agreement envisioned loan modification
18 as a benefit, Defendant could not have breached a duty of good faith and fair dealing on
19 that subject because it owed Plaintiffs no duty to negotiate their loan modification
20 requests.”).

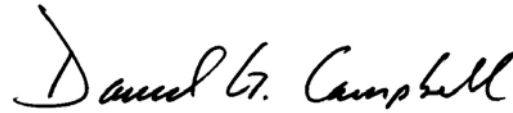
21 As to Gallagher’s argument that Wells Fargo breached the implied covenant by
22 refusing to produce documents he requested, Gallagher has pointed to nothing in the deed
23 of trust to suggest that Wells Fargo was obligated to produce, in connection with an
24 unrelated loan modification, documents from an insurance claim from years earlier. And
25 even if such benefit could be implied, Gallagher fails to allege any damages logically
26 flowing from Wells Fargo’s failure to produce the documents. The loan modification was
27 denied because Gallagher, by his own choice, refused to sign it. Gallagher’s claim for
28

1 breach of the implied covenant based on Wells Fargo's refusal to turn over the documents
2 will be dismissed.

3 **IT IS ORDERED:**

- 4 1. Plaintiff's motion to remand (Doc. 19) is **denied**.
- 5 2. Defendant's motion to dismiss (Doc. 23) is **granted in part** and **denied in**
6 **part**. The motion is denied with respect to Plaintiff's claims for contractual
7 breach of the implied covenant of good faith and fair dealing arising out of
8 the 2010 and 2015 insurance claims, and granted in all other respects.
- 9 3. The deadlines set forth in the case management order (Doc. 20) remain in
10 effect.

11 Dated this 27th day of November, 2017.

12
13
14 

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16 _____
David G. Campbell
United States District Judge